LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 584

JOE R. RAMOS and MARY RAMOS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

JEROME A. DUFFY,
1182 Market Street,
San Francisco, California 94102,
Attorney for Petitioners.

JASPER C. DE DOBBELEER,
1010 B Street,
San Rafael, California 94901,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of Facts	2
(A) The partnership background	3
(B) The 1956 partnership	8
(C) The 1957 partnership	11
Reasons for granting the writ	14
(A) The circuit court in annulling the trial court's findings has made new and different findings, unwarranted by the evidence	14
(B) The circuit court has refused to follow the rule of the Culbertson case and the decisions of other circuit courts which have followed Culbertson	28
Conclusion	30

Table of Authorities Cited

Cases	Pages
A.L.B. Theatre Corp. v. Loew's Inc., 355 F. 2d 495	15
Baker v. U.S., 343 F. 2d 222	15
Barber-Greene Co. v. Bruning Co., 357 F. 2d 31	15
Commissioner v. Culbertson, 337 U.S. 733, 93 L. Ed. 1661	3, 28, 29, 30
Kuney v. Frank, 308 F. 2d 719	24
Lundgren v. Freeman, 307 F. 2d 104	16
Natural Resources Inc. v. Wineberg, 349 F. 2d 685	15
Strickler v. Pfister Assoc. Growers, Inc., 319 F. 2d 788	15
Ventura Co. v. Blackburn, 362 F. 2d 515 (Cal.)	15
Wiseman v. U.S., 327 F. 2d 701	15

Statutes

26 USC:	
Section 704(e)	24
28 USC:	
Section 1254	2
Section 1291	2
Section 1346(a)(1)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No.

JOE R. RAMOS and MARY RAMOS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Joe R. Ramos and Mary Ramos petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the District Court and dismissing petitioners' (cross-appellants') appeal.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Northern District of

California, and the amendment thereto, has been officially reported in 260 F. Supp. 479. It is appended hereto as Appendix A.

The opinion of the Court of Appeals has not yet been officially reported. A copy of the opinion is appended hereto as Appendix B.

JURISDICTION

The consolidated actions are for refunds of federal income taxes, and the District Court had jurisdiction thereof under Sec. 1346(a)(1) Title 28 USC.

Jurisdiction was conferred on the Court of Appeals by Sec. 1291, Title 28 USC.

The jurisdiction of this Court is conferred by Sec. 1254 of Title 28 USC.

The judgment of the Court below was rendered April 10, 1968 and filed April 16, 1968. A Petition for Rehearing was denied on June 25, 1968, but it was not until July 3, 1968 that petitioners' counsel was given notice of the denial.

QUESTIONS PRESENTED

The District Court gave judgment for the petitioners (plaintiffs below), holding that valid family partnerships were in existence and operating as such for both the calendar years 1956 and 1957, and entered judgment that petitioners recover from the United States $23,813.04 as an income tax over-assess-

ment for the year 1956, and $40,317.28 as an income tax over-assessment for the year 1957. The judgments awarded petitioners interest as provided by law.

The Circuit Court reversed the District Court's judgment on the ground that the District Court's findings of fact were "clearly erroneous".

The questions presented are:

1. Where the *entire*[1] evidence, both oral and documentary (save and except Government's Exhibit "A"), was adduced by petitioners, where such evidence was positive and uncontradicted, where it was unimpeached by cross-examination, where it was not inherently improbable, where there was no circumstance reflected in the record casting any doubt on its verity, where *the Government produced no witnesses*, and where the trial Court made its findings of fact based solely upon the evidence adduced, may the Circuit Court reverse on the *sole* ground that the findings of fact are "clearly erroneous"?

2. Is *Commissioner v. Culbertson*, 337 U.S. 733, 93 L. Ed. 1661, and the following body of case law, still the rule of decision and applicable to family partnerships?

STATEMENT OF FACTS[2]

(A) The partnership background.

Petitioner, Joe R. Ramos, was born in Spain and came to the United States in 1925, just before his

---

[1]Italics ours throughout unless otherwise noted.

[2]The recitation of facts is supported in each instance by the record which is uncontradicted and unimpeached.

sixteenth birthday. He is a man of no formal education; his total schooling in Spain was five months; his schooling in the United States consisted of about a month's study in preparation for his citizenship application, which was granted in 1950. He married the petitioner, Mary Ramos, in California, and two children were born of this union, their daughter, Dolores Donaldson, on November 15, 1931, and their son, Joe S. Ramos, on September 17, 1934.

In 1932 petitioner, Joe R. Ramos, began his own farming operations in Colusa County, California. These activities consisted generally in the raising and marketing of corn, rice and wheat crops. About the year 1943 he purchased a 219 acre almond ranch in Winters, California. This ranch has been referred as the "Ramos Home Ranch". He there established the family home. At this time the daughter, Dolores, was about twelve and a half years of age, and the son, Joe S. Ramos, was about nine years of age. Both children finished their grade schooling in the Winters area as well as attending the local high school. Upon completion of the regular high school course, both the daughter and the son were in regular attendance at and graduated from Sacramento Junior College at Sacramento, California,—the son in June 1955.

It was the definite intention, understanding and avowed purpose that when the son reached his twenty-first birthday, a family partnership would come into being. Such idea and purpose was acted upon as early as the year 1946 when the petitioner sought the advice of his then attorney as to the wisdom and propriety

of forming a family partnership with his wife and children.

The long-nurtured ambition, purpose and intent to ultimately engage in a family partnership was entertained by both the parents and the children. Both children during their early years worked, year in and year out, at various ranch and farming chores, both at Colusa and at Winters. As they progressed in years, maturity and ability, they were responsible for and took on more of an active participation in the various ramifications of farming. While in high school Dolores began to learn bookkeeping in connection with the books of account and records of the ranch. She was tutored in this work by Mr. Beverly Laugenour, the certified public accountant who for many years was in charge of the ranch books of account and responsible for petitioners' tax returns. Later she was a partner with her father in the building company of Ramos & Albecete, performing bookkeeping services for that company. This training was consistent with the end result that when the family partnership came into being and was in operation Dolores would have had the necessary experience and competence to handle and serve as the partner in charge and control of the firm's books of account and records.

Correspondingly true is the record of the careful training that the son received at the hands of his father in preparation for his eventual work as the "outside" partner. Young Ramos' many years of apprenticeship were not confined to mere menial farm chores. To the contrary, he was meticulously and

patiently instructed and trained by his father as to the practical aspects and basic intricacies concerning the complete operation and management of almond ranching activities; activities relating to the planting, care and production of crops, particularly almond crops; how to shape up young trees; how trees should be cut on the south side so as to balance out the tree; how to plant trees; the proper time for the spraying and pruning of trees; the details with reference to land contours; the placing of markers on given trees indicating the direction of levees; and the applied science of pollinization. Important also was the training he received from his father in connection with the hiring and recruiting of field workers for crop harvesting. Young Ramos, conversant in the Spanish tongue, accompanied his father to Mexico for the definite purpose of hiring and recruiting harvest workers for the 1955 crop. This was a most important part of the ranch operation because it had to do with the actual crop harvest.

It is not open to question that on numerous occasions the subject of the family partnership was discussed and dwelt on. These discussions became more numerous and pointed as the son neared his twenty-first birthday. There is no dispute that the finalizing of the agreement to form the partnership actually took place at the time that the son graduated from college in 1955. Immediately upon his graduation he went to work on a full-time basis at the Home Ranch in connection with the 1955 crop. Because of his draft status and the fact that he was in the United States.

Naval Reserve, he entered the United States Navy, but not until November 1955, at a time when the 1955 crop had been completely harvested *and the lands prepared for the 1956 crop.*

The Circuit Court agrees with this statement, as stated in the opinion:

> "Preliminarily, we recognize that for several years prior to 1956, the members of the Ramos family had discussion, and intended to enter into, a family ranching partnership when the son became twenty-one years of age. We do not doubt that they intended to enter into a family ranching partnership for the year 1956."

The record is clear, positive and controlling that the tests laid down by *Culbertson* for the determination of a valid family partnership have been met. The yardstick by which the trial Court is to measure the family partnership is set forth at page 742 of the Chief Justice's opinion, where it is declared:

> "The question is *not* whether the *services* or *capital* contributed by a partner are of sufficient importance to meet some *objective* standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—*the parties in good faith and acting with a business purpose intended*

to join together in the present conduct of the enterprise." (*Commissioner v. Culbertson*, 337 U.S. 733.)

(B) The 1956 partnership.

The 1956 partnership was composed of petitioners and their two children. It was the product and culmination of the definite and often expressed intent that the Ramos family would engage in the farming business as a family partnership when the son reached his twenty-first birthday. The Government raised no question as to the good faith or the intention and determination of the family to be so engaged. Nor may it be seriously questioned that this undeniable intent became an accomplished fact. The partnership commenced farming operation for business purposes in 1955, to become effective January 1, 1956. It was operated on a cash and calendar year basis.

The negotiations leading up to the creation of the partnership, and the partnership agreement itself, were entirely oral. The partners did not formalize their understanding by a written instrument because they had been led to understand and believe that a good and sufficient partnership could be legally created without the necessity of written formalities.

Throughout the trial the witnesses were carefully scrutinized by the Court and careful attention was given to the testimony of the members of the Ramos family. The trial Court concluded that the witnesses were candid and sincere, reliable and truthful. The Government has never questioned the veracity of the petitioners or witnesses called on their behalf.

It was agreed that each of the four partners were to have a 25% interest in the partnership, both in the profits, and losses, if any. The children were not called upon to make any capital contributions. The land, trees, buildings and farming equipment were to be supplied by the parents for the use of the partnership, free of rent. The son was to be the partner in charge of farming operations having to do with the production of the almond crop; the daughter was to act as the partner in charge of the partnership books of accounts and records; the father, due to his age and experience, was to be the supervising partner.

It is true that the 1965 partnership lacked the indicia prevalent in a so-called "formalized" partnership. A partnership name was neither adopted nor used (except for the 1956 tax return), and no separate partnership bank accounts were maintained. However, the partnership books of account, in evidence, clearly reflect what were to be considered partnership items and what were to be considered items personal to the petitioners. Mere indicia of outward manifestation associated with formalized partnerships, is neither material nor controlling with reference to the establishment and operation of a bona fide partnership. The 1956 partnership was actually created and brought into being; its farming activities were operated and conducted in good faith; and the partnership was for a definite business purpose. Such is all that the law requires.

During 1956 the son was physically absent from the ranch and engaged in no actual physical farming

activities. His absence was occasioned solely by circumstances beyond his control. He enlisted in the United States Navy in November 1955; he wanted to help and did finish up with the 1955 crop before he entered the service; he was a member of a Naval Reserve unit, and that if he joined the Navy at that time he would have a choice of serving in either the Atlantic or Pacific Fleet. At the time of his enlistment he was twenty-one years of age; he had completed his education; he was unmarried, and he had no physical disabilities; he was immediately available for the military draft. Faced with this situation, and in common with the problem confronting able-bodied men of his age group, he had to make an election as to whether to continue doing the physical work connected with his partnership activities, with an Army draft hanging over his head, or to meet the situation head-on by enlisting. He chose to do so by a Naval enlistment, rather than the hazard of being drafted into the Army.

While on Naval duty he was not unmindful of his partnership status and he actively participated in the operation and conduct of the farming business as best he was able in view of the circumstances which necessitated his physical absence from the ranch. He was in regular communication by letter correspondence with the members of his family, particularly with his father and sister. By means of such mail correspondence he gave his counsel and advice and expressed his views and judgment as to definite and material matters affecting the successful opera-

tion of the partnership farming activities. His mother, his sister and his fiancee visited him at the Island of Hawaii where he was stationed. On the occasion of this visit he made known to them his concern in connection with partnership activities and discussed with them various farming problems and partnership activities.

(C) The 1957 partnership.

The history of the 1957 partnership is plain and simple. Mr. Beverly Laugenour was the petitioners' certified public accountant for many years before the partnership. He had prepared their income tax returns from 1943 to 1955. He was advised that a family partnership was to become operative as of January 1, 1956. In 1956 his personal affairs reached the point where he could no longer handle petitioners' accounting and tax work. He suggested that the work be turned over to Mr. George Franzman, another certified public accountant. Mr. Franzman accepted the employment and from then on became the accountant and tax authority for the Ramos family. On the occasion of his first meeting he was advised that the farming activities were being conducted as a partnership and that this partnership was comprised of the parents, their daughter and son. He investigated and reviewed the background leading up to the 1956 partnership arrangement. He was told that the ranch operations were conducted on a partnership basis and that the partnership was effective at the beginning of the calendar year 1956. He was advised that the profits, after payment of all partnership charges,

were to be split four ways; that all the physical assets were owned by petitioners, but the use thereof belonged to the partnership. After this review and information, Mr. Franzman made the suggestion that the partnership be formalized and reduced to a written agreement. The parties accepted this with the result that the 1957 partnership came into existence on a formalized basis. There were several significant changes. The 1957 partnership was comprised of petitioner, Joe R. Ramos, his son and his daughter. The petitioner, Mary Ramos, was no longer to be a partner. The three partners were to share in the profits, if any, on the basis of 33⅓% each. The partnership, by a written rental memorandum, was to pay petitioners as rent for the use of the land, trees, buildings and equipment a sum equal to 25% of the gross profits of the partnership.

The essential differences between the 1956 partnership and 1957 partnership were that the 25% of the profits which might inure to each of petitioners' benefit, namely, 50%, was reduced to a profit participation of 33⅓% with the added revenue accruing to petitioners of a use rental for the physical properties of 25% of the partnership gross profits. Plainly, the petitioner, Mary Ramos in lieu of a 25% of the net profit as a partner was to participate with her husband in a net profit of 33⅓% plus rental income equivalent to 25% of the gross partnership income. The partnership name of "Joe R. Ramos & Co." was adopted. Bank accounts, both commercial and savings, were opened in the partnership name; a certificate of doing business under partnership name was published

and filed in accordance with California law. The partners, including the daughter and son, were called upon to contribute $15,000.00 each to partnership capital. Each partner's capital contribution of $15,000.00 was actually paid into the partnership and deposited in the partnership bank account. The books of account and bookkeeping records were established in the partnership name. The partnership made a partnership return of income for 1957.

The record with reference to the proof of the 1957 partnership is replete with indicia pointing up the fact that the producing, harvesting and sale of the 1957 almond crop was conducted as a partnership enterprise and on a partnership basis.

The salient points establishing the existence and fact of the 1957 partnership may be summarized as follows:

1. The partnership operations were conducted in accordance with recognized business practices;

2. Each partner made capital contributions of $15,000.00 and that these respective capital contributions were necessary to and were utilized by the partnership in connection with its 1957 operations;

3. That the partners each rendered vital services to the partnership in accordance with their previous understanding and agreement and did the work allocated to them;

4. Joe S. Ramos, the son, by reason of his military service, was not able to be physically present in connection with the bulk of the 1957 farming opera-

tions, until his Naval discharge in October 1957, when he immediately returned home to the ranch and engaged in the performing of his partnership duties as the "outside man" for the balance of the year.

REASONS FOR GRANTING THE WRIT

(A) THE CIRCUIT COURT IN ANNULLING THE TRIAL COURT'S FINDINGS HAS MADE NEW AND DIFFERENT FINDINGS, UNWARRANTED BY THE EVIDENCE.

The opinion of the Circuit Court states:

> "The government contends that each of said findings is 'clearly erroneous'.
>
> 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' *(United States v. Gypsum Co.,* 333 U.S. 364, at 395 (1947)."

The opinion continues:

> "We are mindful that ordinarily the question as to whether a family partnership is valid is one of fact, not of law. *Commissioner v. Culbertson,* 337 U.S. 733 (1949). However, as is true of any other question of fact, where all the relevant and material evidence directs us to but one conclusion, such conclusion must follow as a matter of law. See *Kuney v. Frank,* supra. Here the evidence compels the conclusion that the family arrangements, in each year, created only an anticipatory assignment to the children of future income from property owned and controlled by the parents, and the services of taxpayer."

At the outset we state that because a reviewing Court "is left with the definite and firm conviction that a mistake has been made" does not necessarily mean that the trial Court's findings are "clearly erroneous". This for the reason that even if the Circuit Court is of the belief that the trial Court was mistaken in its findings, where there is substantial, unchallenged and supporting evidence, and even if the evidence could support findings for either side, this does not give the reviewing Court the right to substitute its findings for those of the trial Court. The Circuit Court must view the record in the light most favorable to sustain the judgment. (*Ventura County v. Blackburn,* 362 F. 2d 515 (Cal.).)

In a case tried to the Court, its findings are presumptively correct, and the Court of Appeals takes that view of the evidence favorable to the appellee, and the findings are not to be disturbed unless clearly erroneous, and appellee is entitled to benefit of all favorable inferences.

Barber-Greene Co. v. Bruning Co., 357 F. 2d 31;

See also:

A.L.B. Theatre Corp. v. Loew's, Inc., 355 F. 2d 495;

Natural Resources, Inc. v. Wineberg, 349 F. 2d 685;

Baker v. U.S., 343 F. 2d 222;

Wiseman v U.S., 327 F. 2d 701;

Strickler v. Pfister Assoc. Growers, Inc., 319 F. 2d 788.

The Court of Appeals may not substitute its judgment where conflicting inferences might be drawn from established facts by reasonable men, and inferences drawn could have been drawn by reasonable men.

Lundgren v. Freeman, 307 F. 2d 104.

According to the Circuit Court all that it has to do is to make the pronouncement that a "mistake has been made", irrespective of the quality of evidence produced at the trial; that it was clear and convincing; that it stands unimpeached, and that it is the only evidence in the case.

Oddly enough, the Circuit Court adopted the government's view of the facts as contained in the government's brief. We do not understand why petitioners' statement, the successful parties, was not recognized and adopted as the true statement of facts, particularly where the government's recitation obviously slants favorably to the government's contentions. For example, the Circuit Court in its opinion adopts the language of the government's brief:

> "As of January 1, 1956, a 'family partnership' composed of the taxpayers and their children, Dolores Donaldson and Joe S. Ramos, *purportedly* was to commence."

The plain facts are that there was nothing "purported" about the commencement date of the partnership. The record is replete with plain and positive evidence that the partnership was formed on the occasion of the son's twenty-first birthday and was to commence partnership operations on January 1,

1956. This is just one instance of a "slanting" of the facts. Others will be hereinafter set forth.

The Circuit Court states:

> "The partnership acquired no interest in the land, trees and other improvements which made up the taxpayers' ranch or in the equipment necessary to its operation, as these assets were retained by taxpayers."

The government at page 3 of its brief conceded:

> "The 1956 partnership had the *use* of taxpayers' land, trees and equipment in the production and harvesting of the crops during that year and paid no rent therefor."

It is also of significance that the property taxes attributable to the income producing assets were paid by the partnership.

Thus, the Circuit Court has misstated the uncontradicted and conceded facts that the partnership did acquire an interest in the land, trees and other improvements on the ranch and income producing properties. This right of the partnership to the use, and thus control, of these items created and constituted a real and valuable interest and economic factor. The parents had relinquished, during the existence of the partnerships, their individual right to the use and control of the income producing properties. By the transfer of the right to the use and control of these income producing properties to the partnership, the parents completely divested themselves of their sole and exclusive right to the use, enjoyment and con-

trol of these income producing properties, and had the parents attempted to place these properties to a use other than the partnership use they would have violated their partnership agreement. Nowhere in the record has the government established, nor does it appear, that these income producing properties were used other than for partnership purposes and that the control of the properties was vested solely in the members of the partnership.

The fact that the ranch operations continued during 1956 under the name "Joe R. Ramos", that expenses for ranch operations for that year were paid from petitioners' joint checking accounts, that receipts from ranch operations were deposited to the same account; that there was a co-mingling in the account of both partnership and individual funds is of no consequence. The record is clear and explanatory on each of these facts and the Court found that these facts did not militate against the existence and operation of the 1956 partnership.

The Circuit Court has misstated the record in the adoption of the government's statement:

> "The accounting records of the 1956 ranch operations were kept on a cash basis and were merely a continuation of the individual records maintained by taxpayers in previous years."

The misstatement consists in the failure to point out that the record clearly reflects that while the 1956 bookkeeping entries were a continuation of the books of account labeled "Joe R. Ramos", that the bookkeeping entries clearly reflected the allocation of its items

properly entered for the account of the parents and those entries which clearly reflected partnership items. The record is clear and uncontradicted that neither the bookkeeping partner, Dolores, nor the partnership's certified public accountant, George Franzman, had any difficulty in the preparation of both partnership returns and individual returns for the year 1956, nor did the government, with minor exceptions, find anything out of order in these allocations.

Again, the fact that the 1956 federal employer withholding tax was filed under the name of "Joe R. Ramos, Owner" and under an account number assigned to him and that a Workmen's Compensation report for that year was also filed in taxpayer's name, is of no consequence because the trial court found under the complete and entire evidence relating to these two points, that the same had no effect upon the validity of the 1956 partnership.

Again, of what consequence is it that the father because of his experience was the senior partner and "boss" of the partnership, or that he made decisions concerning the selling of crops grown on the ranch and generally supervised ranch operations, or that he received no salary or allowance for his work? His right of seniority, decision and supervision in connection with partnership affairs does not prevent a partnership. We venture to state that hundreds of thousands of partnerships are conducted through the medium of a senior partner. The uncontradicted record shows that his rights of seniority, supervision and operation *were at all times subject to the ultimate control of the*

partners. The fact that the father as senior partner received no salary for his work is clearly expressed in the record of his testimony that he wanted no compensation because he did not wish to be put in the position where he could be called upon to do any work if he did not feel like doing it.

The fact that Dolores lived with her husband and worked full time through 1956 as a clerk for the Pacific Gas & Electric Co., and did work on a part-time basis for the partnership, for which she was paid, again is of no consequence to the validity of the partnership. There is no rule of law that demands that the validity of the right to participate in business as a partner carries with it the alternative of a given number of hours of work or a given dollar compensation for services rendered. It is crystal clear that the 1956 partnership could not have functioned without the bookkeeping and office services rendered by Dolores. She was the only member of the partnership who possessed the knowledge and skill to carry on this vital part of the partnership operations and she was trained for years to take over this particular work.

While it is true that the son was on military duty in Hawaii during most of 1956, this statement completely omits other related and material facts, namely, that he became a partner in 1955 and worked on the ranch during that year, and that part of his work was the preparation of the ranch for the 1956 crop. Also negated is the fact that while in Hawaii he was in constant communication with his partners, was aware of ranch operations and gave his written advice con-

cerning the same. He actively participated in ranch operations within the limits of his military service.

> "The 1956 almond crop was sold on June 26, 1967, by Joe R. Ramos as the seller." This statement by the Circuit Court is only partly true.

What is omitted is that the proceeds from the sale of this crop were reflected in the partnership accounts and the money used for the payment of partnership expenses.

It is true that the 1956 partnership filed a federal partnership information return in the name of "Joe R. Ramos Co." It is likewise true that this return reflected the total receipts received by the partnership as well as the total expenses, including depreciation and real property taxes on assets belonging to petitioners but which were paid from partnership accounts. It is also true that the 1956 partnership reflected a substantial profit and each partner received slightly in excess of $38,000.00 as his/her share. This was strictly in accordance with the partnership agreement.

The Circuit Court points out that from the daughter's distributive share paid to her in February, 1957, she paid $16,000.00 for her 1956 income taxes and $1100.00 for her California income taxes. What the Circuit Court has omitted to state is that the daughter's entire distributive share of $38,000.00 *was deposited to the joint bank account of herself and her husband;* that from this joint account there was paid the 1956 income taxes, federal and state, of herself

and her husband, and, the significant omission, that from this account there was paid to the 1957 partnership $15,000.00 as her contribution to partnership capital and that the balance remained in the joint account of herself and her husband. This dealing with the $38,000.00 profit is highly significant in that there was complete ownership and control of her distributive share by herself and her husband and not one cent of this money was in any manner or form under the control of either her father or her mother.

The same handling holds true, with minor variations, insofar as the son's distributive share was concerned. He likewise contributed $15,000.00 to the capital of the 1957 partnership. The record is clear that the son had complete dominion and control over his money.

The foregoing is the briefest resume possible of the Circuit Court's opinion with reference to the facts concerning the 1956 partnership. These facts and others were found to be true by the trial court. Still, in the face of these uncontradicted and conceded facts the Circuit Court states that the trial court made a mistake in finding a valid family partnership for 1956 and that its findings are "clearly erroneous."

In the face of these findings based upon uncontradicted and unimpeached evidence the Circuit Court has concluded:

> "Hence, we have before us a claimed family partnership in which the parents retained ownership and *control* of the income producing properties, and to which the children contributed neither

property or services except the bookkeeping services of the daughter, for which services she was compensated."

This is where the Circuit Court makes a vital mistake and itself makes findings that are "clearly erroneous" because:

1. It is not true that the parents retained "control of the income producing properties." This for the reasons heretofore assigned and again reiterated in that the *control* of the income producing properties for 1956 was vested in the partnership and because of the partnership agreement these properties were no longer under the sole and exclusive control of the parents. The *right of use by the partnership* of these properties, per se, placed these properties under the sole and exclusive control of the *partnership*. Nowhere in the record is there one instance wherein the control of the income producing properties were exercised other than in complete accord with the partnership agreement and solely for partnership purposes.

2. The Circuit Court likewise has erroneously concluded that the children contributed neither property nor services nor capital. The right to the use of income-producing properties is a property right to which the children each had a one-fourth interest. The children's rights to the use of the income producing properties were conferred upon them by gifts from the parents and in turn these gifts were transferred to the partnership for its sole and exclusive use. The father testified, without contradiction:

"I don't give no property to them. I just give the business, the crops business but not the property, no."

For the Circuit Court to hold in view of testimony, and the entire supporting record, that the children had no interest in income producing property, is to in effect deny a proven fact and the attempt to make a new finding completely without support in the record, and to deny the plain meaning and intent of the Internal Revenue Code (26 USC Sec. 704(e)), which states:

"A person shall be recognized as a partner for purposes of this sub-title, if he owns a capital interest in the partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or *gift* from any other person."

The Circuit Court has placed reliance on *Kuney v. Frank,* 308 F.2d 719. The *Kuney* case is so completely different on its *facts* that it is of no avail as an authority in the instant case. In *Kuney* it was held there was no substantial evidence to sustain a holding of a family partnership because the parents retained control of the *income* and the *donated interests.* The facts in Ramos differ sharply, and are completely to the contrary. In the case at hand the record is clear and uncontradicted that the income paid to the son and daughter by way of partnership profits was completely beyond the control of the parents and solely and completely under the control and enjoyment of the daughter and son, respectively. As far as any so-

called "donated interests" are concerned, the record specifically points up that the parents gave up their sole and exclusive right to the *use* of the lands, trees and equipment and thereby lost their dominion and control of these properties thus having vested in the partnership.

The Circuit Court claims absence of partnership services but concedes that the daughter rendered bookkeeping services to the partnership. The daughter's services are attempted to be negated by the fact that she was compensated therefor. A partner may draw compensation for services as well as participate in partnership profits.

We turn now to the 1957 partnership.

The Circuit Court holds that there was no change in the economic relationships of the parties in 1957 as compared to 1956 "unless it can be said that the contribution of each child of $15,000.00 to the capital of the partnership, in March 1957, was significant." The opinion then attempts to brush aside the $15,000.00 contribution of each child to the 1957 partnership on the basis that this money was derived by the children from their profits in the 1956 partnership. Further distinction is attempted by the Court's statement that each contributed sum of $15,000.00 was originally paid out of the taxpayers' joint account and "finally deposited in another bank account which taxpayers alone could draw upon." This is not the record. The children, in complete control of their share of the 1956 profits, withdrew on their own funds and each voluntarily contributed $15,000.00 to the capital of the

1957 partnership. The evidence is clear and uncontradicted that it was deemed advisable to have a total contribution to capital of $45,000.00 in the partnership for the purpose of meeting and defraying expenses incurred in the operation of the partnership. The record is uncontradicted that the money was deposited to the partnership account and was used in connection with the payment of partnership expenses. The fact that the father and not the children could draw upon the partnership account is in nowise a controlling factor. The money in the partnership account was earmarked for partnership purposes and the fact that the children, as partners, relied upon the integrity of their father, as the senior partner, to utilize the moneys for partnership purposes in no manner detracts from the validity of the partnership. The undeniable fact remains that none of the partnership moneys on deposit in either the commercial or savings account were utilized for anything but partnership purposes. There is not one word in the record wherein the taxpayers used one cent of partnership money for their individual purposes. It is obvious that the Circuit Court's opinion, at this juncture, is grasping at the most insignificant straws in an attempt to bolster its opinion. The fact that the checking account never fell below $40,000.00 does not establish that working capital was unnecessary. The fact that $70,000.00 from partnership receipts were placed in a *savings* account and were left untouched for the remainder of the year, likewise does not establish that capital contributions were not necessary. It is

certainly prudent management to husband the savings of the good years so the partnership would not be financially embarrassed in the bad years. Common knowledge of farming operations has long taught us that these operations are always financially hazardous. Good crop years are followed by poor crop years. Farming operations are always subject to the vagaries of weather, drought, blight and market conditions. The net result of the Circuit Court's cursory examination into the 1957 partnership leads to the inevitable conclusion that the Court, from all of the facts and circumstances surrounding the 1957 partnership, has determined that there can be no such thing as a valid "family" partnership.

The Circuit Court's entire opinion appears to be nothing more than a studied effort to twist and distort the uncontradicted facts and to give a construction to these facts which would lead to the conclusion rendering impossible the formation and operation of a family partnership for the two years in question. It is to be inferred that the opinion of the Circuit Court expresses itself as being utterly opposed in principle to "family" partnerships. The Circuit Court has taken upon itself to completely negate the District Court's findings and to make new, further and different findings toward the end of reaching an opposite result to that concluded by the District Court. The Circuit Court has accomplished this end by the bland pronouncement that its review of the entire record in this case "leaves us with a definite and firm conviction that the District Court was mistaken in each of

said findings." The ruling of the Circuit Court is patently erroneous because it is not true that *each* of the lower Court's findings resulted from any mistake of the District Court. To the contrary, *each* of the District Court's findings is supported by clear and uncontradicted evidence.

The District Court has properly stated at page 485 of its reported opinion:

> "If, on the instant record, the Court were to conclude that there was no true partnership in existence and operating during the years involved, it would be substituting its judgment for that of the parties. This record does not reflect 'a misuse of the outward form of a partnership as a device for the obtaining of tax advantages'. This Court finds that the parties, *without thought of tax advantage,* in fulfillment of a long-nurtured and oft expressed desire 'in good faith and acting for a business purpose' and a 'community of interest in the profits and losses', joined together in the conduct of the almond orchard and farming activities of the Ramos Home Ranch. *This was their true intention* and the history of the partners in their actual operations during the last six months of 1955 and throughout 1956 and 1957 bears this out."

(B) THE CIRCUIT COURT HAS REFUSED TO FOLLOW THE RULE OF THE CULBERTSON CASE AND THE DECISIONS OF OTHER CIRCUIT COURTS WHICH HAVE FOLLOWED CULBERTSON.

The Circuit Court's opinion is a complete and startling departure from the *Culbertson* case and is at

complete variance with the decisions of the Circuit Courts involving similar principles of law and based upon comparable facts. The Circuit Court's decision also creates an area of confusion as to numerous reported decisions of the various district courts throughout the country which have relied upon *Culbertson* and the decisions of circuit courts following the rule of *Culbertson*. To maintain uniformity, the decision should be set aside.

Without burdening this petition or the Court with a detailed analysis of the various authorities which have placed reliance and have followed the rule enunciated in *Culbertson*, we respectfully refer the Court to the following cases:

Alexander v. C.I.R., 194 F. 2d 921 (see footnotes 2-3, pp. 923-924);
Ardolina v. C.I.R., 186 F. 2d 176;
Barrett v. C.I.R., 185 F. 2d 150;
Campbell v. Batman, 239 F. 2d 283, 285;
Cobb v. C.I.R., 185 F. 2d 255;
Eisenberg v. Smith, 263 F. 2d 827;
First Sec. Bank v. U.S., 213 F. Supp. 372 (affirmed, 9th Cir., June 5, 1964);
Funai v. C.I.R., 181 F. 2d 390;
Ginsberg v. Arnold, 185 F. 2d 913;
Greenberger v. C.I.R., 177 F. 2d 990;
Henslee v. Whitson, 200 F. 2d 538, 540;
Jones v. Baker, 189 F. 2d 842;
Jones v. Trapp, 186 F. 2d 951;
Lamb v. Smith, 183 F. 2d 938;
Marcus v. C.I.R., 201 F. 2d 850;

Neil v. C.I.R., 26 F. 2d 563;
Nicholas v. Davis, 204 F. 2d 200;
Parker v. Westover, 221 F. 2d 603;
Pike v. United States, 231 F. 2d 688;
Scofield v. Davant, 218 F. 2d 486;
Seabrook v. C.I.R., 196 F. 2d 322, 328;
Snyder v. Westover, 217 F. 2d 928;
Stanback v. C.I.R., 271 F. 2d 514;
Tomilson v. C.I.R., 199 F. 2d 674;
Visintainer v. C.I.R., 187 F. 2d 519;
Walberg v. Smyth, 142 F. Supp. 293;
Weizer v. C.I.R., 165 F. 2d 772;
Williamson v. United States, 152 F. Supp. 716.

CONCLUSION

The Circuit Court's opinion poses a serious threat to the entire body of the law upon which reliance is had with reference to the operation and conduct of family partnerships. The opinion emasculates the principles enunciated in *Culbertson* and the long line of cases that have relied on *Culbertson* as the guiding rule for the creation and operation of family partnerships. The opinion of the Circuit Court, if permitted to stand is in direct conflict with the salutary rule enunciated in *Culbertson*. If under the circumstances and facts in Ramos a family may not create and operate a family partnership, and the opinion of the Circuit Court stands, then we state that family partnerships are a thing of the past and such enterprises may no longer be recognized as valid business enterprises.

The petition for certiorari should be granted and the decision below reversed.

Dated, San Francisco, California,
September 18, 1968.

Respectfully submitted,
JEROME A. DUFFY,
Attorney for Petitioners.

JASPER C. DE DOBBELEER,
Of Counsel.

(Appendices Follow)